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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

LACY D. KIRKMYER, G. CLIFFORD KIRKMYER, and L. D. KIRKMYER, G. C. KIRKMYER and AGNES KIRKMYER, Executors of the Will of JAMES ARCHIE KIRKMYER, Deceased, Partners trading and doing business as JAMES RIVER OIL COMPANY,
PETITIONERS,

vs.

ARKANSAS FUEL OIL COMPANY, a West Virginia Corporation.

PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Lacy D. Kirkmyer, G. Clifford Kirkmyer, and L. D. Kirkmyer, G. C. Kirkmyer and Agnes Kirkmyer, Executors of the Will of James Archie Kirkmyer, Deceased, Partners trading and doing business as James River Oil Company, petition for a writ of certiorari to

the United States Circuit Court of Appeals for the Fourth Circuit to review its judgment in favor of respondent entered January 6, 1947, reversing a final judgment of the District Court of the United States for the Eastern District of Virginia in a case involving the ceiling price of gasoline established by Price Schedule 88 issued by the Office of Price Administration, sold to petitioners by respondent in which petitioners were defendants and respondent was plaintiff.

SUMMARY STATEMENT OF THE MATTER INVOLVED

Respondent Arkansas Fuel Oil Company, a refiner of petroleum products, sued petitioners, partners trading under the firm name of James River Oil Company, for $40,428.07 for goods sold and delivered, the suit being in the Federal Court on the ground of diversity of citizenship. Petitioners filed an answer and counterclaim which they later superseded with an amended answer in which they pleaded illegality.

The plea of illegality does not apply to $8,056.53 of the amount sued for, and petitioners have paid the respondent the part admittedly due.

This controversy concerns the liability of petitioners to pay for gasoline sold and delivered to them by the respondent between March 10, 1943, and July 31, 1943, at the agreed price of $32,346.26. The defense is that the purchase price was above the O. P. A. ceiling. Since buying and/or selling at above ceiling prices is made a crime by statute, and both parties participated

in the crime neither can recover anything from the other.

The District Court held the ceiling price of the gasoline sold to the petitioners by respondent to be $.0695 per gallon whereas respondent had charged petitioners .0795 and .07816 per gallon and thereupon sustained the defense of petitioners and entered up final judgment in favor of petitioners.

The Circuit Court of Appeals for the Fourth Circuit in its opinion held that: O. P. A. ceiling price for the gasoline sold petitioners was .087 per gallon. It further, by inference, held that respondent could at any time change its method of dealing with petitioners from one based on a delivered price with respondent paying the freight to one based on an f. o. b. price with petitioners paying the freight to destination. Thereupon the Court reversed the decision of the District Court and directed that summary judgment be entered in favor of respondent against petitioners in accordance with respondent's motion for summary judgment made in the District Court.

It follows that, in order for petitioners to prevail, they must establish:

1. That the O. P. A. ceiling price for the gasoline sold petitioners by respondent was .0695 per gallon.

2. That respondent could not change its method of dealing with petitioners from a delivered basis to an f. o. b. basis when such a change resulted in an increased cost to petitioners.

JURISDICTIONAL STATEMENT

Sec. 240 of the Judicial Code, 28 U. S. C. A. §347, confers on the Court jurisdiction in this case.

QUESTIONS PRESENTED

The only questions presented here are:

1. What the O. P. A. ceiling price of the gasoline sold petitioners by respondent actually was; and

2. Whether respondent could change its method of dealing with petitioners from a delivered cost basis to an f. o. b. basis when such a change in method of deal ing resulted in an increased cost to petitioners.

Petitioners assign as error the holding of the Circuit Court of Appeals that the ceiling price of the gasoline purchased by them from respondent was .087 per gallon and that respondent could change its method of dealing with petitioners as set forth in (2) above.

REASON RELIED ON FOR ALLOWANCE OF THE WRIT

The Circuit Court of Appeals has:

Rendered a decision probably in conflict with the principles of law laid down by the Emergency Court of Appeals in a recent case decided by said Court involving the interpretation of similar pricing provisions of

similar O. P. A. regulations. *United States Gypsum Co. v. Brown,* 137 F. 2d 360 (Em. App., 1943)

The conflicts referred to in the foregoing paragraph are these:

1. Whether or not a sale made during the so-called "base period" established by applicable O. P. A. regulations on a uniform delivered cost basis to a customer in a designated area, regardless of varying transportation costs to delivery points in that area, established a uniform delivered price by which seller was bound under maximum price regulations.

2. Whether or not a seller can shift from a delivered basis to an f. o. b. basis when the effect of such shift is to increase seller's maximum price and buyer's cost.

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued to the United States Circuit Court of Appeals for the Fourth Circuit commanding that Court to certify and send to this Court for its review and determination a transcript of the record and proceedings of said Court in the case lately pending therein on its Docket No. 5497 wherein your petitioners Lacy D. Kirkmyer, G. Clifford Kirkmyer, and L. D. Kirkmyer, G. C. Kirkmyer and Agnes Kirkmyer, Executors of the Will of James Archie Kirkmyer, Deceased, Partners trading and doing business as

James River Oil Company, were appellees and respondent, Arkansas Fuel Oil Company, was appellant, and that the judgment therein made be reversed by this Honorable Court.

LACY D. KIRKMYER, G. CLIFFORD KIRKMYER, and L. D. KIRKMYER, G. C. KIRKMYER and AGNES KIRKMYER, Executors of the Will of JAMES ARCHIE KIRKMYER, Deceased, Partners trading and doing business as JAMES RIVER OIL COMPANY,

BY ITS ATTORNEYS,

GUY B. HAZELGROVE,

T. NELSON PARKER,

ALEXANDER W. NEAL, JR.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

LACY D. KIRKMYER, G. CLIFFORD KIRKMYER, and L. D. KIRKMYER, G. C. KIRKMYER and AGNES KIRKMYER, Executors of the Will of JAMES ARCHIE KIRKMYER, Deceased, Partners trading and doing business as JAMES RIVER OIL COMPANY,
PETITIONERS,

vs.

ARKANSAS FUEL OIL COMPANY, a West Virginia Corporation.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The question on this application for certiorari is whether or not the decision of the Circuit Court of Appeals is in conflict with a decision of the Emergency Court of Appeals in a similar case involving interpretation of similar O. P. A. regulations.

STATEMENT OF THE CASE

Petitioners and Respondent had been dealing with each other for several years prior to the recent war. Respondent did not maintain a terminal at Norfolk, Virginia, as did other major refineries but used Petitioners' terminal. As a result petitioners under their contract enjoyed a unique sales position in that they purchased gasoline from Respondent on a delivered basis several cents per gallon less than any other distributors could. When war came the O. P. A. was established and issued Price Schedule No. 88, which established maximum prices for petroleum products throughout the United States.

Respondents maintained that their ceiling price for sales to Petitioners was determined under Price Schedule 88, Appendix A, subsection (b)(1), which is set forth in detail in the opinion of the Circuit Court of Appeals. This section provided for an f. o. b. terminal price or an f. o. b. delivered price if quoted. Since Respondent had no terminal in Norfolk, Virginia, no price was quoted for it. O. P. A. upon application of Petitioners advised respondent that its sales to petitioners were governed by Appendix A, subsection (b)(2) which fixed Respondent's price at "the price charged at that point by him on the last sale of a substantial quantity of the same product to a purchaser of the same general class" during the base period, viz.: "within 60 days prior to October 15, 1941". The following is the text of this subsection:

> "Where the maximum price for a petroleum product at a given shipping or delivery point

cannot be determined under subparagraph (1) of this paragraph the maximum price for each seller at such shipping point or delivery point shall not exceed the price charged at that point by him on the last sale of a substantial quantity of the same product to a purchaser of the same general class, within sixty days prior to October 15, 1941. Where the product is sold on a delivered basis at a given point the maximum price shall be the price charged on the last sale of a substantial quantity of the same product to a purchaser of the same general class made on a delivered basis at that point in the period specified. Where the product is sold at a given point on an f.o.b. shipping point basis, the maximum price shall be the price charged on the last f.o.b. shipping point sale at that point of a substantial quantity of the same product to a purchaser of the same general class in the period specified. The term "sale" in this subparagraph shall include sales and contracts of sale made during the period specified and deliveries made during the period specified under contracts made prior thereto which permitted adjustments to reflect changes made prior to the dates of such deliveries, in the prices of the petroleum and/or petroleum products purchased or used by the seller in order to make deliveries under such contracts. Deliveries during the period specified under contracts entered into prior thereto which did not permit such adjustments shall not be regarded as sales for the purpose of calculating maximum prices under this subparagraph."

Since Petitioners were the only ones to whom sales were made by Respondent in this class during this period its ceiling price under this section was .0695 per gallon which included certain increases authorized by O. P. A. The District Court and O. P. A. held that Petitioners' ceiling price had to be determined under the latter section and that .0695 per gallon was the ceiling price. The Circuit Court of Appeals held that Respondent could change its method of dealing by shifting the course of its dealing with Petitioners from a delivered basis to an f.o.b. basis. It further held that the price to be charged was that of the terminal operator at whose terminal the gasoline was made available, said price being determined under Appendix A, subsection (b)(1) although the gasoline was billed through respondent and petitioners paid respondent.

This in effect meant that petitioners who operated chains of service stations and sold to jobbers could be forced to pay the same price for gasoline as the price received by them upon its resale. In other words, if the Circuit Court of Appeals is correct in its decision, respondent could by changing its course of dealing from a delivered basis to an f.o.b. terminal basis, increase the price of gasoline to Petitioners by several cents per gallon. Petitioners submit that this was not the intention of O. P. A. when it issued Price Schedule No. 88.

The Emergency Court of Appeals also recognized this principle when it handed down its decision in *United States Gypsum Company* v. *Brown*, 137 F. 2d 360 (Em. App., 1943); *Certiorari* denied Oct. 25, 1943, 64 S. Ct. 88.

The facts in that case were somewhat similar to the case at bar; the principles of law and interpretation of O. P. A. regulations as embodied therein are almost identical. The United States Gypsum Company, as did respondent in this case, usually sold to purchasers at prices f.o.b. its factory. In those cases the purchaser paid and bore the burden of the freight from the mill to destination and his total cost varied in each case with the amount of the freight. The question involved in the case was who should pay the additional 3% transportation tax and the price administrator conceded that in the case of those customers who had been buying on an f.o.b. mill basis the transportation tax would have to be borne by the customer. However, in the case of areas within which a delivered price had been the customary mode of dealing, the price administrator ruled that the delivered price during the base period of March 1942 as established by the O. P. A. regulation was the proper ceiling price, and that in such cases any freight increases or other increases in the cost of transportation must be borne by the seller. The Emergency Court of Appeals so held and this Court refused *certiorari*.

It is significant to note that one of the main reasons for the increase in price by respondent was the increase in transportation cost. Prior to the war shipments of gasoline had been delivered by ocean going tankers, whereas during the war deliveries were made by railroad tank cars and through pipe lines. This mode of transportation was more expensive than tanker transportation. In reality, however, since respondent was a member of the so-called transportation pool it received from Defense Supplies Corporation, a govern-

mental agency, a subsidy payment equal to the difference between the so-called normal mode of transportation before the war, ocean tanker, and the so-called abnormal mode of transportation during the war (railroad tank car and pipe line). However, it was, of course, more advantageous for respondent to sell to petitioners on an f.o.b. terminal basis since the f.o.b. terminal price had always been greater than the delivered price at which petitioners had always bought.

In so holding that a shift from a delivered basis to an f.o.b. mill basis was illegal when the buyer's cost was increased by such a shift, Petitioners respectfully submit that the Emergency Court of Appeals recognized the principle of maintaining the *status quo* insofar as customs of the trade were concerned relative to certain areas and certain individuals who were in a class by themselves. In other words, it upheld the contention of O. P. A. that the intent of the Emergency Price Control Act of 1942 was to forbid changes in methods of dealing when such changes tended toward increased prices to one or the other of the parties involved or evasion of the act. The following excerpt from the opinion further brings this out:

> "Finally, we note that the classification adopted in the order and amendment was expressly approved by both the Senate and House Committee reports upon the bill. Sen. Rep. No. 931 77th Cong. 2d Sess. (1942), 17; H.R. Rep. No. 1409, 77th Cong. 1st Sess. (1942), 6. In the Senate Report it is said: "Section 2(c) of the Bill provides for flexibility in the establishment

> of maximum price and rent, and other, regulations under the bill. It authorizes classifications, differentials, adjustments, and reasonable exceptions which in the judgment of the administration are necessary or proper to effectuate the purposes of the bill. For example, classifications and differentiations may be made in terms of quantity, quality, or character of the use contemplated by the purchaser, or in terms of delivered prices on the one hand and F. O. B. prices on the other, or other conditions of sale. Differentiations of this character and many more that could be mentioned are essential in formulating workable maximum price regulations. * * * "

Petitioners, therefore, respectfully submit that this Court should issue a writ of *certiorari* to the United States Circuit Court of Appeals for the Fourth Circuit commanding that Court to certify and send to this Court for its review and determination a transcript of the record and proceedings of said Court in the case lately pending therein on its Docket No. 5497, wherein

your petitioners were appellees and the respondent was appellant, and that the judgment therein made be reversed by this Honorable Court.

Respectfully submitted,

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